

ATTACHMENT 16

Plaintiffs' Motion for Leave to File
Response to Intuitive's Objection to
Certain Class Certification Reply
Evidence

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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

IN RE: DA VINCI SURGICAL ROBOT
ANTITRUST LITIGATION

Lead Case No: 3:21-CV-03825-AMO-LB

THIS DOCUMENT RELATES TO:
ALL ACTIONS

**HOSPITAL PLAINTIFFS'
ADMINISTRATIVE MOTION FOR
LEAVE TO FILE RESPONSE TO
DEFENDANT INTUITIVE SURGICAL,
INC.'S OBJECTION TO CERTAIN
CLASS CERTIFICATION REPLY
EVIDENCE [FILED UNDER SEAL]**

Judge: The Hon. Araceli Martínez-Olguín

Pursuant to Civil Local Rule 7-11 and 7-3(d), Plaintiffs Larkin Community Hospital, Franciscan Alliance, Inc., and King County Public Hospital District No. 1 (collectively, “Plaintiffs”) submit this administrative motion for leave to file the attached Response (“Proposed Response”) to Intuitive’s Objection to Certain Class Certification Reply Evidence (“Objection”), ECF No. 298. Intuitive Surgical, Inc. (“Intuitive”) filed the Objection pursuant to Local Rule 7-3(d)(1), which provides that, “[i]f *new evidence* has been submitted in the reply, the opposing party may file and serve an Objection to Reply Evidence[.]” Civ. L. R. 7-3(d)(1) (emphasis added). Any such objection “may not include further argument on the motion.” *Id.* Because Intuitive’s Objection (1) violates both of those requirements, and (2) is inescapably a de facto, unauthorized sur-reply (as shown below), the Objection should be stricken from the record. Alternatively, Plaintiffs hereby request leave to demonstrate why the Objection is meritless and should be overruled.

First, Plaintiffs’ expert Professor Einer Elhauge’s challenged opinions do not constitute “new evidence.” In fact, Prof. Elhauge rendered the objected-to opinions in his initial Class Certification Report—and, in some instances, even his Merits Reports—and Intuitive examined Prof. Elhauge about these opinions in his class certification deposition, which took place before Intuitive filed its Class Certification Opposition on August 2, 2024. *See* ECF No. 296-2 (Elhauge Corrected Class Cert. Report dated July 13, 2024) ¶¶ 643-44, 675, 680-81, 830, 846, 933-35; ECF No. 127-2 (Elhauge Corrected (Merits) Report dated Jan. 10, 2023) ¶ 375; ECF No. 127-4 (Elhauge (Merits) Rebuttal Report dated March 3, 2023) ¶ 426a. *See also* Declaration of Jeffrey J. Corrigan in Support of Hospital Plaintiffs’ Administrative Motion for Leave to File Response to Defendant Intuitive Surgical, Inc.’s Objection to Certain Class Certification Reply Evidence, Ex. 1 at 51:3-6, 74:13-78:12, 118:2-7, 128:8-15, 136:17-137:6, 139:18-142:3. Accordingly, prior to filing its Class Certification Opposition, Intuitive knew full well that Prof. Elhauge had opined that the tying arrangements at issue increased Intuitive’s market power on robots, and that factoring in that effect would, if anything, only increase the damages class members suffered from Intuitive’s anticompetitive conduct. *See* Proposed Response § I. The objected-to opinions properly rebut the

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Respectfully submitted,

/s/ Reena A. Gambhir

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